

# N.W. Bernstein & Associates, LLC

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January 19, 2021

*Via electronic mail and Federal Express*

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United States Environmental Protection Agency  
Region 5  
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Chicago, IL 60604-3590

Matthew Ohl  
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Douglas Petroff, Environmental Manager  
Indiana Department of Environmental Services  
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Re: Supplement to Notice of Dispute, Statement of Position and Effort to Informally  
Resolve a Dispute Pursuant to Section VIII of the 2002 Administrative Order By  
Consent, Docket Number V-W-02C-698 (The "2002 Consent Order").

Dear Mr. Krueger, Mr. Ohl, Mr. Habeck and Mr. Petroff:

In our letter to you of January 15, 2021 we made repeated reference to a work plan that we would be submitting regarding the sheet pile enclosed DNAPL area at Third Site. Later in that same day, the work plan was submitted on behalf of the Trustees by Geosyntec. We respectfully request that the Geosyntec January 15, 2021 work plan be included in the administrative record of this dispute.

Additionally, although EPA has no subject matter jurisdiction to decide Constitutional questions, the Trustees reserve the right in the event of judicial review to challenge to assert their rights under the Constitution of the United States, including that the dispute resolution process under the 2002 Consent Order (the “2002 AOC”) is a deprivation of property without Due Process of law in violation of the Fifth Amendment of the Constitution of the United States.

As noted in our January 15, 2021 letter, vast sums would need to be spent to try to remediate every square foot of the DNAPL area. The Third Site 2002 AOC, Section VIII, however, requires the following procedure to resolve the dispute. First, after written objections are submitted, the Trustees and the EPA enter into a “Negotiation Period” where they attempt to resolve the dispute. *Id.* If the parties are unable to reach an agreement, the EPA issues a written decision on the very dispute to which it is a party. That decision then becomes incorporated into and an enforceable element of the 2002 AOC. *Id.* The penalties for non-compliance that EPA can impose under the 2002 AOC are up to \$37,500 per day. 40 CFR § 19.4, covering statutory civil monetary penalties, as adjusted for inflation, and accompanying tables.

The Trustees on behalf of the Non-Premium Respondents are thus deprived of the opportunity to conduct discovery or call or cross-examine witnesses before an impartial fact finder in order to develop their objections and defend against the EPA’s counter-arguments.<sup>1</sup> “[I]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2259 (2009) (quoting *In re Murchison*, 349 U.S. 133,

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<sup>1</sup> EPA allows the right to call witnesses for some types of dispute but resolution of the issues presented in this dispute are *not* included among them. See 40 CFR § 22.1.

136 (1955)). As described, the dispute resolution process mandated by the Third Site 2002 AOC provides that EPA, one of the parties to the dispute, issues the final decision on the dispute. “[D]ue process requires a ‘neutral and detached judge *in the first instance*’ . . . .” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 617 (1993) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972))(emphasis added); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (same); *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). The dispute resolution process in the 2002 AOC does not provide the Trustees with a fair tribunal or a fair process for a decision as to the validity of their objections to EPA’s moving the goal posts for the DNAPL area, as set forth in our January 15, 2021 letter. Nor does the 2002 AOC on its face limit EPA’s ability to impose penalties of up to \$37,500 per day for our unwillingness to accept that decision.

That same element of coercion without due process was before the court in *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). The Eleventh Circuit found that the EPA’s compliance order provision in the Clean Air Act (“CAA”) to be an unconstitutional violation of Due Process. In that case, the EPA had issued an administrative compliance order (“ACO”) under the CAA. The court recognized the ACO had the status of law independent of the statute, and that severe civil and criminal penalties could be imposed for noncompliance with the ACO, also independent of the statute. The court noted that “the problem with ACOs stems from their injunction-like legal status coupled with the fact that they are issued without an adjudication or meaningful judicial review.”<sup>2</sup> *TVA v. Whitman*, 336 F.3d at 1241. The court further held that:

Before the Government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal “at a meaningful time

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<sup>2</sup> Additionally, the court found that the procedures the EPA put in place to “reconsider” the ACO were also problematic, in part, because discovery was effectively unavailable. *Id.* at 1246.

and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). . . . [T]he scheme enacted by Congress deprives the regulated party of a “reasonable opportunity to be heard and present evidence” on the two most crucial issues: (a) whether the conduct underlying the issuance of the ACO actually took place and (b) whether the alleged conduct amounts to a CAA violation.

*Id.* at 1258.

It is no answer to say “you consented.” That was also the case in *TVA v. Whitman*.

Whitman had signed the Consent Order in that case, too. And as in *TVA v. Whitman*, the scheme in place to dispute EPA’s conduct under the 2002 AOC deprives the Trustees, on behalf of the settlors of the Trust, the Constitutional right to Due Process. This scheme “unconstitutionally delegates judicial power to a non-Article III tribunal,” *id.* at 1259, and in this case, a non-judicial body whose case manager decided in the first instance to move the goal posts.<sup>3</sup>

Further, to the extent that the Respondents disagree with EPA’s final decision on the dispute and seek judicial review, they risk penalties of up to \$37,500 per day under CERCLA § 106(b)(1), 42 U.S.C. §9601(b)(1) (2002 AOC § X at 24-25; 40 CFR 19.4) while judicial review is proceeding. Thus, the 2002 AOC unconstitutionally impedes any appeal to an Article III Court for an

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<sup>3</sup> Since that decision, the Supreme Court has shown an increasing willingness to protect citizens from administrative overreach. In *Lucia v. SEC* 138 S. Ct 2004 (2018) the Court struck down a decision of an SEC Administrative Law Judge, because it found him to be an Officer of the United States appointed by the staff of the SEC, and not by the Commission, as required by the Constitution’s Appointment Clause. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) the Court so cobbled *Auer* deference (court deference to an administrative agency’s interpretation of its own rules), that the Chief Justice, whose concurrence decided the outcome, could find little difference between that outcome and the view of the dissent that would have overturned *Auer* entirely to protect the role of the judiciary to decide what the law is. The Chief Justice also cautioned that the issue of *Chevron* deference (court deference to an agency’s interpretations of a statute passed by Congress that it administers) was not resolved in *Kisor*. The underlying concerns as expressed in the dissent in *Gundy v. United States* 139 S. Ct. 2116 (2019) (in which the Chief Justice joined) is to protect citizens from an excess of power being delegated to law enforcement agencies. As the dissent noted “[t]here can be no liberty where the legislative and the executive powers are united in the same person, or body of magistrates” citing *The Federalist* No. 47 at 302 (Madison), *Id.* at 2135.

independent review of EPA's decision and impedes the enforcement of Due Process rights guaranteed by the Fifth Amendment to the Constitution of the United States.

Very truly yours,

*/s/ Norman W. Bernstein and Peter M. Racher*

Trustees of the Third Site Trust Fund